

89-1905

FILED

JUN 5 1989

JOSEPH F. SPANIOLO, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

WISCONSIN PUBLIC INTERVENOR, and TOWN OF
CASEY,

Petitioners,

v.

RALPH MORTIER and
WISCONSIN FORESTRY/RIGHTS-OF-WAY/
TURF COALITION,

Respondents.

APPENDIX VOLUME II

THOMAS J. DAWSON
Assistant Attorney General
& State of Wisconsin
Public Intervenor
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-8987
Counsel of Record

LINDA K. MONROE
121 South Hamilton Street
Madison, WI 53703
Counsel for Petitioner
Town of Casey

COPY

STATE OF WISCONSIN CIRCUIT COURT WASHBURN
COUNTY

Ralph Mortier and)	PARTIAL TRANSCRIPT
Wisconsin)	--FINDINGS BY THE
Forestry/Rights-)	COURT
of-Way/Turf)	MOTION HEARING
Coalition,)	
Plaintiffs,)	CASE NO. 86 CV 134
vs.)	
Town of Casey,)	
Wisconsin, Imbert M.)		
Eslinger, Louis N.)		
Place, and Roland K.)		
Colby,)	
Defendants.)	

The above-entitled matter came duly on hearing before Hon. Dennis C. Bailey, Circuit Judge, on May 16, 1988, at the Washburn County Courthouse, Shell Lake, Wisconsin.

APPEARANCES:

PAUL G. KENT, Attorney at Law, DeWitt, Porter, Huggett, Schumacher & Morgan, PO Box 2509, Madison, WI, 53701, appearing for and on behalf of the plaintiffs;

RICHARD J. LEWANDOWSKI, Attorney at Law, DeWitt, Porter, Huggett, Schumacher & Morgan, also appearing for the plaintiffs;

THOMAS J. DAWSON, Attorney at Law,
appearing as Wisconsin Public Intervenor for
the State; PO Box 7857, Madison, WI, 53707;

LINDA MONROE, Attorney at Law, 217 South
Hamilton, Suite 409, Madison, WI, 53703,
appearing for and on behalf of the defendants
Town of Casey.

FINDINGS BY THE COURT:

Well, counsel and the court agree on one thing, first of all, and that is that the issue before the court is purely a legal issue. It's not the function of this court, or any other court for that matter, to decide the policy questions of which level of government is more appropriate to regulate and control the use and nonuse of pesticides and herbicides. While I may personally feel that the local control is probably more effective control than is control from the EPA office in Washington or wherever else, that's beside the point totally.

The question is, of course, as counsel have pointed out, is whether or not pursuant to the Supremacy Clause of the US Constitution, the federal government, in passing the FIFRA law, has in fact preempted the area of regulation and use of pesticides from the local governments, which in Wisconsin, of course, traditionally, the powers of the Town Board has adopted -- or strike that -- the powers which the Town Board has by adopting the Village powers, without question, does have the power to pass ordinances such as the ordinance under question in order to further the health and welfare of the public; no question about that. The question is whether or not the federal government and/or the state government has preempted that area pursuant to the authority granted to the federal government by the Constitution of the United States.

The court does find that the town ordinance in question is an extremely broad

ordinance and on its face does cause conflict with the state and federal regulations covering the pesticide and herbicide issues.

The court in looking at the issue of federal preemption, does look at the statutory language contained in FIFRA and does take note of the fact that FIFRA does, indeed, provide that the state -- which does not include political subdivisions of the state and elsewhere in the FIFRA language, itself, where Congress intended to include a reference to political subdivisions -- the words state and political subdivisions are, indeed, used showing a consciousness of Congress and the drafters of that legislation to the distinction between states and states and the political subdivisions thereof.

There is argument by counsel as to what is meant by express preemption. There is no disagreement between counsel that if either the state or federal law specifically said in the law, itself, that this area is hereby

preempted from all state, local subdivisions, political subdivisions, we'd all agree that that's express preemption. Whether or not we want to call it some level of express preemption or implied preemption, this court does find and conclude that the area of regulation and use of pesticides and herbicides has been preempted by federal law. And the example I gave for the statutory language is part of the language which is used and the, well, the language and the rationale used by the court to determine whether or not preemption has taken place.

The compelling documentation before the court regarding legislative history leads this court to the same conclusion as was adopted by the Maryland court in the Maryland Pest Control case. In order to determine whether or not there was federal preemption, the court must look at the Congressional intent. And one manner of looking at Congressional intent is by looking at the legislative history. And

one other area where counsel is in agreement is as to that wording of the legislative history regarding the ultimate passage of the FIFRA.

The court agrees with plaintiffs' counsel that the reading of the legislative history does not show that there was a compromise including language in FIFRA which would expressly allow regulation by local political subdivisions or language which expressly disallowed that. The only question before Congress and before the Senate and the House as well as their respective committees was whether to include language which would permit regulation by the local subdivisions, local political subdivisions. It comes across clear in the legislative history that it was clearly the intent of the drafters of this legislation and the intent of the Congressional committees and ultimately the intent of Congress, itself, that the language, as ultimately passed, would preempt or would prohibit the regulation by

local political subdivisions. Although there is some language in the Maryland Pest Control case that I am sure both counsel and myself agree was kind of sloppy, one portion of this language I don't think was sloppy and I virtually adopt and that was where the Maryland court stated as follows:

"As previously indicated, this legislative history could not be more clear. Both the House and the Senate expressly considered the question of whether local governments should be authorized to regulate pesticides and, although there was an interim disagreement between two Senate committees on the issue, the legislation as finally enacted by the Senate and the House did not include the proposed language, clearly focused upon in both chambers, which would have authorized local pesticide regulation. Principled decision-making and respect for the integrity of the legislative process compel the

conclusion that Congress knew and meant what it was doing." This court agrees with that.

And finally, as alluded to previously, because of the broadness of the language in the town ordinance, the court does find that that ordinance does, indeed, conflict with the language contained in FIFRA as well as Chapter 94 Wis Stats for the reasons as already cited by counsel; that under that language of the ordinance, the Town Board could, indeed, in their own discretion permit or prohibit the use of a certain pesticide, irregardless of what state or federal law had to say on the particular matter.

And I do hope that -- I do feel that there is definitely a role to be played by the local political subdivisions such as the town boards, the cities, counties, since they are the people who are right on top of the situation. They are the people who live with it. Whether it be in the administration of the provisions or whatever I do hope, and

certainly by the urging of local citizens, that the state and Congress would further expand on these laws so as to include a role to be played by the local bodies of government for the ultimate protection and health of us as citizens. But I as the court or the court speaking here cannot do that and that is not the function of the court. I'm merely expressing some of my own personal views there.

The court further finds and concludes that the area of pesticide use and regulation has also been preempted from the local political bodies by state law. The court is not going to make any specific finding with reference to the comprehensiveness or lack of comprehensiveness with reference to the federal law FIFRA or Chapter 94 of the Wisconsin Statutes. The court feels that the term comprehensive is subjective at best and certainly there are few, if any, laws that are totally comprehensive in their application and

direction with reference to particularly an item such as this where one is regulating the use and control of various pesticides and herbicides which are day-to-day being remade and with the continuing scientific exploration into having these pesticides and herbicides become more selective, if you will, towards attacking what it is they are intended to attack without any adverse side effects on human beings as well as our wild life and our trees and other habitat.

(This concludes the
findings by the court.)

- - - - -

Jul 05 1988

STATE OF WISCONSIN CIRCUIT COURT WASHBURN
COUNTY

Ralph Mortier and	-	FILED Jun 16 1988
Wisconsin	-	Patrick E.
Forestry/Rights-of-	-	Harrington
Way Turf Coalition,	-	Clerk of Circuit
	-	Court Washburn
Plaintiffs,	-	County
	-	FINDINGS OF FACT,
v.	-	CONCLUSIONS OF LAW
	-	AND ORDER
Town of Casey,	-	Case No. 86-CV-134
Wisconsin, Imbert	-	
M. Eslinger, Louis	-	
N. Place and Roland	-	
K. Colby,	-	
Defendants.	-	

The above-captioned matter having come before the Court, the Honorable Dennis C. Bailey, Circuit Judge, presiding on May 16, 1988, for a hearing on Plaintiff's motion for summary judgment; and the Court having considered pleadings, briefs and supporting papers, and oral argument of counsel; and the Court having issued an oral decision from the bench granting Plaintiff's motion; the Court

hereby makes the following findings of fact and conclusions of law and order.

FINDINGS OF FACT

1. The Plaintiff Ralph Mortier is an adult resident of the City of Spooner, Washburn County, Wisconsin, residing at Route 3, Box 3360, Spooner, Wisconsin 54801.

2. The Plaintiff Wisconsin Forestry/Rights-of-Way/Turf Coalition is a not-for-profit voluntary association of individuals, businesses or associations whose members have used and may wish to use federally-registered pesticides to their land. Its business office is located at 1400 East Washington Avenue, Suite 185, Madison, Wisconsin 53703.

3. The individual defendants, Imbert M. Eslinger, Louis N. Place and Roland K. Colby, are all adult residents of the Town of Casey and were at the time the lawsuit was initiated, members of the Town Board and were sued in their official capacity.

4. The Defendant Town of Casey is a town organized and governed by the provisions of Wis. Stat. Ch. 60, which has adopted village powers under Wis. Stat §60.22(3).

5. The Wisconsin Public Intervenor, a duly designated Assistant Attorney General under Wis. Stat. §165.07, moved to intervene and was granted status as a party by order of the Court on October 1, 1986.

6. Jurisdiction and venue is properly vested in this Court.

7. The Plaintiffs have the requisite standing to bring this action.

8. This action represents a justiciable controversy.

9. On or about September 10, 1985, the Defendant Town of Casey enacted Ordinance 85-1 with respect to the regulation of pesticides which is incorporated by reference.

10. The federal government regulates pesticides under the provisions of the Federal

Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 USC §136, et seq.

11. The State of Wisconsin regulates pesticides under Wis. Stats. §§94.67 - 94.71.

CONCLUSIONS OF LAW

1. It was the intent of Congress that the language in FIFRA would preempt and prohibit the regulation of pesticides by local governments. As a result, the area of local pesticide regulation has been preempted by federal law.

2. It was the intent of the Legislature to preempt the regulation of pesticides by local governments. As a result, the area of local pesticide regulation has also been preempted by state law.

3. Town Ordinance 85-1 conflicts with federal and state law and regulations.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and for the reasons set forth in the Court's oral decision of

May 16, 1988, which is incorporated herein by reference, IT IS HEREBY ORDERED:

A. Town of Casey Ordinance 85-1 is void, invalid and of no effect, and the Defendants, their agents, successors, assigns and all others acting in concert therewith are hereby enjoined and restrained from enforcing or in any other way requiring compliance with the Ordinance.

B. The Plaintiffs are entitled to their statutory costs of \$45.00 filing fee, \$27.40 service fees and \$100 attorneys fees.

Dated this 14th day of June, 1988.

BY THE COURT:

/S/_____
Hon. Dennis C. Bailey
Circuit Court Judge

Approved as to form:

/S/_____ Thomas J. Dawson Public Intervenor	/S/_____ Paul G. Kent Attorney for Plaintiffs
---	---

/S/_____
Linda Monroe
Attorney for Town of Casey

WHEREAS, the Washburn County Agriculture Committee has applied pesticides for the purpose of conifer release to county forests within the Town of Casey; and

WHEREAS, research indicates that no pesticide is completely safe and that pesticides previously used by the County Agriculture Committee in the Town of Casey may be hazardous to human health in the following ways: 2,4-D has been found to be carcinogenic, teratogenic, mutagenic, and can cause peripheral neuropathy. Persistence in soil beyond one year is possible. 2,4-DP has been found to be carcinogenic, and can cause miscarriage. Glyphosate can form carcinogenic compounds in soil. Picloram has been found to be carcinogenic, may cause peripheral neuropathy, accumulates in soil and may persist over 20 years; and

WHEREAS, county forest lands are to be managed so as to provide recreational opportunities and assure maximum public benefits, sec. 28.11(1), Stats., and county

APPENDIX C

benefits, sec. 28.11(1), Stats., and county forest lands in the Town of Casey are, in fact, used by the permanent and summer residents of Casey for recreation, including hunting and berry-picking; and

WHEREAS, the plants sought to be controlled in county forests by application of pesticides do not pose an imminent threat to forest crops, and can be controlled over the longer period of time required for scheduled mechanical removal of competing broadleaf plants; and

WHEREAS, the Town of Casey desires to protect its residents from the danger of consuming game or berries taken from an area to which pesticides have been applied, and from coming in contact with these pesticides on public lands or roads; and

WHEREAS, aerial spraying of pesticides increases the risk of injury or damage to persons, property and the environment, due to the increased likelihood of pesticide drift

and pesticide overspray; and

WHEREAS, lakes and streams in the Town of Casey are important environmental and recreational resources, and aerial spraying of pesticides can affect and has affected these waters as a result of drift and/or overspray; and

WHEREAS, aerial spraying of pesticides in the Town of Casey has affected property beyond the boundaries of the target area as a result of drift and/or overspray; and

WHEREAS, the Town of Casey desires to protect its residents, recreational resources and private and public property from injury or damage due to drift or overspray of pesticides; and

WHEREAS, the Town of Casey has previously indicated, by resolution, its strong opposition of pesticides; and

WHEREAS,, on the 9th day of April, 1983, at the Annual Meeting of the Town of Casey, the Town of Casey granted to the Town Board of

Casey, village powers under sec. 60.18(12), Stats. (1981-82); and

WHEREAS, the Town Board, under the authority of secs. 61.34(1) and (5), Stats., does deem it in the interests of the Town to protect the health, safety, and general welfare of its township, community and residents;

NOW, THEREFORE, the Town Board of the Town of Casey does ordain that Ordinance No. 85-1, entitled "An Ordinance to Require a Permit for the Application of Pesticides," be created to read as follows:

Ordinance No. 85-1

An Ordinance to Require a Permit for the Application of Pesticides

Section 1. Application of Pesticides Permit Process.

1.1 Definitions. (1) "Person" means any individual, group of individuals, partnership, associaton, corporation, government, governmental

agency, or other entity or combination of entities.

(2) "Pesticide" means any substance or mixture of substances labeled or intended for use or used for:

(a) preventing, destroying, repelling, or mitigating any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, or other micro-organism (except viruses, bacteria or other micro-organisms on or in living persons or other living animals) declared to be a pest under federal or state law (7 U.S.C. § 136 et seq., sec. 94.67 et seq., Wis. Stats., and regulations issued under those laws); or

(b) defoliating plants,

regulating plant growth or accelerating the drying of plant tissue.

(3) "Aerial Application of Pesticides" means the release of pesticides from any aircraft.

(4) "Public Lands" means all lands and all interests in lands owned by the state, the County of Washburn or the Town of Casey either as proprietor or as trustee, and which are dedicated in whole or in part to public use and benefit.

(5) "Private Lands" means all lands which are not public lands.

1.2 Application of Pesticides. No person may apply any pesticide to public lands, or to private lands subject to public use (including, but not limited to Forest Croplands, as defined in chapter 77, Stats.), or may aerially apply any pesticide to private lands within the Town of Casey except after obtaining a permit under section 1.3

1.3 Permit Process. (1) Permits.

Permits may be issued by the town board for a single application of pesticide(s), or for a series of applications of pesticide(s) to a single defined area, provided the last application of the series will be completed within 60 days of the first application of the series.

(2) Request for permit. Any person who intends to apply any pesticide to public lands, or to private lands subject to public use, or who intends to aerially apply any pesticide to private lands, shall, not less than 60 days before the proposed application, file a request for permit and information with the Town Board, on such forms as the Board may prescribe. Forms may be requested from the Town Clerk, whose address is:

Town of Casey Star Route
Box 137
Spdoner, Wisconsin 54801

The information shall include, but shall not be limited to:

(a) the purpose for the desired application(s);

(b) the approximate date(s) and time(s) of the application(s);

(c) the areas of the Town of Casey to be affected by the application(s);

(d) an inventory of the pesticide(s) to be used listing the brand name, generic component ingredients, the quantities to be used, method of application, known benefits and know risks associated with the chemical(s) to be used;

(e) the chemical and non-chemical alternative methods or treatments available to accomplish the desired objectives and the reasons why the application of the proposed pesticide(s) is preferable to alternative chemicals and to other methods;

(f) the status of the proposed

pesticide(s) and of any chemical alternatives in the federal Environmental Protection Agency's (EPA) pesticide reregistration program including but not limited to:

i. the status of the proposed pesticide(s) and any chemical alternatives in the Data Call-In Program, including whether a Data Call-In Notice or equivalent has been issued, whether the EPA has reached a final decision regarding data that are required, and the status of data collection;

ii. the status of the proposed pesticide(s) and any chemical alternatives in the Registration Standards Program, including whether and when a Registration Standard or Guidance Package has been issued;

iii. the status of the proposed pesticide(s) and any chemical alternatives in the Special Review

Program including Pre-Special Review status, whether and when Position Documents 1, 2, 2/3 or 4 have been published or are expected to be published, what presumptions against registration are presented in those Documents, which risk criteria, as defined in 40 CFR sec. 162.11, have been possibly met or exceeded, and the EPA's regulatory action or proposed action for the pesticide(s);

(g) the positive and negative effect of reducing or eliminating the use of the proposed pesticide(s) and of any chemical alternatives;

(h) the anticipated impact of the application upon humans, animals and plants of the proposed pesticide(s) and of any chemical alternatives;

(i) the precautions that will be taken to protect the public and to minimize public exposure to the proposed

pesticide(s) and to any chemical alternatives, and the actions that will be taken to mitigate any adverse impacts of the application of the proposed pesticide(s) and of any chemical alternatives; and

(j) such other information as may be required.

(3) Initial Determination by Town Board. Within 15 days after receipt of a completed request for permit and information, the Town Board, after consideration of the information, shall post in 3 places in the town and mail to the person requesting the permit notice of its decision to either deny the permit, grant the permit, or grant the permit with conditions. When the Board denies or places conditions on a permit, it shall state the reasons therefor. The board may impose any 'reasonable conditions on a permitted application related to the protection of the health, safety and welfare

of the residents of the Town of Casey. Such requirements may include, but shall not be limited to:

(a) a requirement that an application be confined to an area not used by the public for recreation;

(b) a requirement that a reasonable method of ground application, rather than aerial spraying, be used.

(4) Request for Hearing. Within 5 business days after mailing notice of the Board's initial determination to the person requesting a permit, and posting such notice in the town, the person requesting a permit or any town resident may request a hearing before the Board.

(5) Hearing.

(a) A hearing before the Town Board shall be scheduled within 20 days after receipt of a written request for hearing. Notice of the hearing shall be posted in 3 public places in the Town of

Casey and shall be published in a newspaper of general circulation in the Town of Casey, not less than 5 days before the hearing.

(b) Any person requesting a hearing may present information before the Board relating to the safety of the chemicals proposed to be applied, or of the method of application, the costs of the proposed application compared to the costs of alternatives to the application, or any other items of information relating to application of pesticides.

(c) After consideration of information produced at the hearing and contained in the request for permit, the Board shall either deny the permit, grant the permit, or grant the permit with conditions relating to the protection of the health, safety and welfare of town residents.

(d) Notice of the final

decision of the board shall be mailed to the person requesting the permit within 5 days of the hearing. If the final decision differs from the initial decision, the board shall state the reasons therefor.

(6) Fees. A person requesting a permit to apply pesticides shall include a fee of \$25 with the request to cover costs of processing the request.

(7) Notice. When a permit to apply pesticides is granted, or granted with conditions, the permittee will post placards giving notice of the application(s).

(a) Each placard shall contain the words: "WARNING--AREA TREATED WITH PESTICIDE" in one-inch block letters. the placards shall also contain, in letters at least 1/4 inch high, the intended date(s) and time(s) of application(s), the brand name and generic component ingredients of the

pesticide(s) used, and any label information prescribing safe reentry time to the area of application.

(b) Placards shall be posted at least 24 hours prior to the intended application, or, in the case of multiple applications of pesticide(s) to a single area, at least 24 hours prior to the first such application. If the application date is changed, a new notice shall be given as soon as reasonably possible prior to the application. Placards shall be maintained for at least 6 months after the last date of application allowed by the permit.

(c) If the application is to public lands; or to private lands subject to public use; or if the application is to private lands not subject to public use, but the area to which pesticides are applied is within 100 feet of a road, other public right-of-way, or land not

owned or controlled by the permittee; then notice shall be posted approximately every 1/4 mile along the perimeter of the treated area and any normal access points from roads or other public rights-of-way.

Section 2. Penalty.

Any person who violates any of the provisions of this ordinance, or directs another to violate it, shall in addition to being liable for all damages resulting from each violation, be subject to a forfeiture of up to \$5,000.00 for each violation thereof. Each day shall constitute a separate violation.

Section 3. Severability.

If any section, sentence or clause of this ordinance is held invalid or unconstitutional, such holding shall not affect the validity of the remaining portions of the Ordinance.

Section 4. Effective Date.

This Ordinance shall take effect upon passage by the Town Board and publication as required by law.

The foregoing Ordinance was duly adopted by the Town Board of the Town of Casey at a regular meeting of the Town Board on September 10, 1985.

Imbert Eslinger, Town Chairman

Mary Emerson, Town Clerk

Adopted: Sept. 10, 1985

Published: Sept. 19, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-1865

COPARR, LTD. and VICTOR A.
CARANCI,

Plaintiffs,

v.

THE CITY OF BOULDER,

Defendant.

FILED
UNITED STATES
DISTRICT COURT
DENVER, COLORADO
OCT 3 1989
JAMES R.
MANSPEAKER
CLERK

JUDGMENT

Pursuant to the memorandum opinion and order entered by U. S. District Judge Richard P. Matsch on October 3, 1989, it is

ORDERED AND DECLARED that that those provisions of the Boulder Revised Code that were enacted by Ordinance No. 5083 are void and invalid; that the City of Boulder is enjoined from enforcing them against the plaintiffs; that those provisions of the Boulder Revised Code that were enacted by

APPENDIX D

Ordinance No. 5129 are valid and may be enforced and that no attorneys' fees or costs will be awarded to any party.

Dated: October 3, 1989

JAMES R. MANSPEAKER, CLERK

By: Jacob Gilmore /s/
Deputy Clerk

APPROVED:

Richard P. Matsch/s/
Judge Richard P. Matsch

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-1865

COPARR, LTD. and VICTOR A.
CARANCI,

Plaintiffs,

v.

THE CITY OF BOULDER,

Defendant.

FILED
UNITED STATES
DISTRICT COURT
DENVER, COLORADO
OCT 3 1989
JAMES R.
MANSPEAKER
CLERK

MEMORANDUM OPINION AND ORDER

MATSCH, Judge

This civil action challenges Ordinance Numbers 5083 and 5129 enacted by the City of Boulder with respective effective dates of December 31, 1987, and August 5, 1988. The ordinances are now incorporated into the Boulder Revised Code. The plaintiffs are the Colorado Pesticide Applicators for Responsible Regulation ("Coparr"), a non-profit trade association of commercial pesticide applicators, and Victor Caranci, a manager of

residential property in Boulder who contracts for the commercial application of pesticides and personally applies pesticides on that property, as needed. The plaintiffs seek 1) a declaratory judgment that the ordinances are void under the Supremacy Clause of the U. S. Constitution, Article VI, Clause 2 because such local regulations are pre-empted by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 et seq; 2) an injunction against enforcement of the ordinances; 3) an injunction against the enactment of any ordinance regulating the sale and use of pesticides as covered by FIFRA; and 4) attorney's fees under 42 U.S.C. § 1988. Jurisdiction is alleged under 28 U.S.C. §§ 1331, 2201, and 2202. The legal questions have been presented by cross motions for summary judgment. There are no genuine issues of material fact. Oral argument was heard on March 16, 1989.

In general, FIFRA requires that all pesticides be registered with the Environmental Protection Agency (EPA) prior to sale. The EPA Administrator may classify pesticides for general or restricted use; promulgate certification standards for applicators of restricted pesticides; impose packaging and labeling requirements upon pesticides; and prescribe regulations for making and maintaining records. Pursuant to Section 136v of FIFRA, 7 U.S.C. § 136v, Colorado has enacted the Colorado Pesticide Act, C.R.S. § 35-9-101 et seq. and the Colorado Pesticide Applicator's Act, C.R.S. § 35-10-101, et seq.

The defendant argues that this court lacks jurisdiction to grant the declaratory relief requested by plaintiffs, citing Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983). In Franchise Tax, a state agency sought a declaration that its tax levies were

not pre-empted by ERISA. The case was removed to the federal court. The Court held that federal jurisdiction did not exist, even though the defendant could have filed a coercive action in federal court to enjoin application of the state regulation. The distinction was that the federal claim would arise only as a defense to an action brought under state law. This case is different, as the Court recognized in Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 at n. 14 (1983). Here, as in Shaw, the plaintiffs seek a declaratory judgment that local law is pre-empted under the Supremacy Clause. The federal question is the controlling element of the plaintiffs' claims. Accordingly, the dispute is within the subject matter jurisdiction granted in 28 U.S.C. § 1331.

The Boulder ordinances are currently in effect and require an immediate and significant change in the plaintiffs' conduct. The case is therefore ripe for determination

even though no enforcement action is pending. Abbott Laboratories v. Gardner, 387 U.S. 136, 153 (1967) (authorizing pre-enforcement judicial review of food and drug regulations where they require "an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance").

The plaintiffs have presented affidavits showing that the Boulder ordinances will subject them to fines and imprisonment; will have a significant detrimental affect on their ability to conduct business; will interfere with applicators' ability to determine application dates on an ad hoc basis as permitted by prevailing weather conditions; and that the posting of notices will create an unfavorable impression on the public regarding pesticide application.

The defendant contends that "neither plaintiff has standing to challenge both ordinances and, therefore, each plaintiff's

challenge must be limited to the ordinance in which each has a concrete stake in the outcome." Defendant's motion at 2. That assertion has no practical effect. Plaintiffs in the aggregate have standing to challenge both of the Boulder ordinances and there is an obvious connection between the requirements affecting property owners and those affecting commercial applicators.

The parties agree that Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, (1986) established the following criteria for determining federal pre-emption:

The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal

law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.

Id., at 368-69 (citations omitted).

The plaintiffs rely primarily upon section 136v of FIFRA, 7 U.S.C. § 136v, to support their position that Congress intended to pre-empt local regulation of pesticides by authorizing limited state regulation in these words:

(a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

(c)(1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the

purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator.

The argument is that this express grant of state authority without mention of local governments expresses an intent to exclude them from the field of pesticide control.

The submitted legislative history is not conclusive of Congressional intent. The House Agricultural Committee "rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H.R. Rep. No. 511 at 16. The Senate Committee on Agriculture and Forestry agreed with that position. S. Rep. No. 92-838, 92d Cong. 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 3993, 4008. The Senate Commerce Committee disagreed, and proposed an amendment specifically authorizing local governments to regulate the use of pesticides. S.Rep. No.

92-970, 92d Cong. 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4111.

The compromise bill passed by a Senate vote of 71-0 did not contain any provision explicitly authorizing local regulation. See 118 Cong. Rec. 32263. Senator Allen, chair of the subcommittee on Agricultural Research and General Legislation, inserted into the Congressional Record (with unanimous consent) an excerpt from the Senate Committee on Agriculture and Forestry Report, stating that FIFRA "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." Id. at 32256. The joint explanatory statement of the Conference Committee did not address the subject of local regulation. Conference Report No. 92-1540, 92d Cong. 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4130.

Courts have come to different conclusions about this legislative history. In Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109, 111 (D. Md. 1986), aff'd without opinion, 822 F.2d 55 (4th Cir. 1987), the court found that "the evidence is clear that Congress . . . concluded that only States and not their subdivisions should be authorized to regulate the sale and use of pesticides." In People ex rel Deukmejian v. Mendocino County, 683 P.2d 1150, 1160 (Cal. 1984), the court found that "[T]he legislative history [of section 136v of FIFRA] does not demonstrate a clear congressional intention to preempt traditional local police powers to regulate the use of pesticides or to preempt state power to distribute its regulatory authority between itself and its political subdivisions." The court read the legislative history as adopting a compromise position by which local regulation was neither authorized nor prohibited. The states were left free to

determine whether their powers should be exercised directly, by political subdivisions, or both.

The California court's approach is consistent with the historical view of state sovereignty and the state's freedom to distribute regulatory power between itself and its political subdivisions. This court agrees with that analysis. In Colorado, the state constitution grants to the people of home rule cities "the full right of self-government in both local and municipal matters." Colorado Constitution, Art. XX, Section 6. Boulder is a home rule city with the powers granted by Article XX. To the extent that pesticide regulation can appropriately be characterized as a "local matter," Boulder has the same authority as the state. There is no doubt that the use of pesticides within a city is a matter affecting the health and welfare of the people in it. Accordingly, the subject is a

matter for local concern and is within the legislative power of a home rule city.

In addressing the broad question of whether FIFRA has "occupied the field" of pesticide regulation, there is a presumption that "local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715 (1985). Boulder maintains that its ordinances address the where, when, and how of pesticide application in the city, issues outside the scope of FIFRA. That claim is too broad. It is also in conflict with those provisions of Ordinance No. 5083 that provide for local enforcement of FIFRA, the Pesticide Act, the Pesticide Applicator's Act and regulations promulgated thereunder by incorporating them. The result is that the violation of any of their provisions constitutes a violation of the Boulder ordinance and exposes the violator to the

sanctions of the Boulder Revised Code. It is obvious that enforcement is an integral part of any regulatory system. To permit Boulder to engraft the national and state laws into its regulatory scheme would undermine the conclusions that there are legitimate areas of local concern not addressed by the Congress and state legislature. While mutual exclusivity is not required, there would be an inversion of the pyramid of power if municipal law enforcement agencies interpreted and applied state and federal law.

Because the Colorado Pesticide Act and Pesticide Applicators' Act were enacted in recognition of and are complementary to FIFRA, the pre-emption doctrine is applied as if those state statutes are a part of the federal law. It is not possible to sever provisions of Ordinance No. 5083. Taken as a whole, that ordinance is invalid because it is in conflict with FIFRA. The Boulder City Council carefully avoided such a conflict when it

adopted Ordinance No. 5129. It imposes notification requirements prior to the airborne application of pesticides on users and the contracting parties, not commercial applicators. Post-application notification is required for applications to lakes. The plaintiffs have failed to show any conflict between the separate notification requirements of that ordinance and the federal-state regulatory system. The assertion that compliance may be difficult because of weather conditions is insufficient to establish a barrier or conflict with federal and state law.

The plaintiffs are entitled to a judgment declaring Ordinance No. 5083 null and void and to an injunction prohibiting the enforcement of its provisions. The plaintiffs' attack on Ordinance No. 5129 is rejected. That ordinance is valid and enforceable. The plaintiffs' request for an injunction from enacting any ordinance regulating the sale and

use of pesticides as set forth in FIFRA is rejected because of this court's conclusion that there is an area of legitimate local regulatory power. Because this litigation has produced mixed results and the plaintiffs' broad claim of pre-emption has been denied, no attorneys' fees will be awarded.

Upon the foregoing, it is

ORDERED that judgment will enter declaring that those provisions of the Boulder Revised Code that were enacted by Ordinance No. 5083 are void and invalid; that the City of Boulder is enjoined from enforcing them against the plaintiffs; that those provisions of the Boulder Revised Code that were enacted by Ordinance No. 5129 are valid and may be enforced and that no attorneys' fees or costs will be awarded to any party.

Dated October 3, 1989

BY THE COURT:

Richard P. Matsch/s/
Richard P. Matsch, Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PROFESSIONAL LAWN CARE
ASSOCIATION OF AMERICA,

Plaintiff,

-v-

No. 89-1439

VILLAGE OF MILFORD,
MICHIGAN.

Defendant,

Proceedings had before the Honorable
Horace W. Gilmore, United States District
Judge, at Detroit, Michigan, on Thursday,
August 24, 1989.

APPEARANCES:

KENNETH A. FLASKA
JOSEPH D. LONARDO
Appearing on behalf of Plaintiff

PATTI A. GOLDMAN
PAUL V. GROTH
Appearing on behalf of Defendant

REPORTED BY:

ELIZABETH A. HIGDON,
CSR RPR
Official Court Reporter

APPENDIX E

2

case which, your Honor, is not just a District
Court opinion but went to the Fourth Circuit
and was affirmed.

THE COURT: Affirmed without opinion?

MR. LONARDO: Per curiam.

THE COURT: Without a published opinion?

MR. LONARDO: With a published opinion.

THE COURT: With a published opinion?

MR. LONARDO: Yes.

MR. FLASKA: Not published.

MR. LONARDO: I am sorry, your Honor, two
page opinion not published.

THE COURT: I thought it was unpublished.

MR. LONARDO: I am sorry. I think it is
attached to our brief.

THE COURT: Thank you both very both.

I think this is a very interesting
question and I would like to spend a lot more
time working on it because I think it is very
close. However, I think it is more important
that we have a decision because I am sure
whichever way I decide, one side or the other

is going to take it to the Court of Appeals. And, as I say, I think it is a very close question but I think I am prepared to rule and I will rule now.

The question arises about preemption provisions of the Federal Insecticide, Fungicide and Rodenticide Act or FIFRA. There are no disputed facts and we are here on cross motions for summary Judgment.

In 1986 the Village of Milford enacted an ordinance that regulated the use and application of pesticides in the following way. It required that any company that was coming in to use pesticides in Milford had to pay a \$15 fee, it had to register with the City of Milford, and it had to post a notice after the pesticide was sprayed to stay up for 72 hours saying in effect the pesticide has been put on and children and animals should keep off. That may be a little general but that is basically what the ordinance says. It says in effect, "Any person who applies or

causes pesticides to be applied shall pay the \$15 annual fee, shall file a statement with their name, address, telephone number, and the generic names of any pesticides to be used. They also must provide and place a yard marker containing the words 'chemically treated lawn -- and keep children and pets off for 72 hours.'" And the ordinance further prohibits property owners from removing the sign during the 72 hours.

Now it is the contention of the Plaintiff, Professional Lawn Care Association of America, that FIFRA has totally occupied this field and that these regulations of the Village of Milford are regulations of the use of pesticides, and because the federal government and FIFRA has totally occupied the field, given authorization to states to control but has specifically denied authorization to local areas, that an injunction should issue enjoining the implementation of the ordinance. It is the position of the Village of Milford,

and I am summarizing these very briefly, that FIFRA has entered this field and given the state authority to regulate pesticides, to regulate labeling and the like, but that this ordinance, which basically requires a \$15 annual fee, a posting and the filing of the name, address and telephone number and the like of the pesticide company, does not -- is not an area that was intended to be preempted by FIFRA, that this is an area of supplemental regulation, that it is not preempted and that there is not an intention for clear, complete regulation.

Now FIFRA, specifically 17 U.S.C. 136 and following, provides that the federal government and the states will participate in a pesticide regulatory effort, and the specific language of the statute in Section 136v(a) is that, "A State may regulate the sale or use of any federally registered pesticide or device in the State," and then they proceed to define state as a State, the

District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa. They stop there with those very specific definitions. Therefore, Plaintiff's position that Congress' intent was to preclude the exercise of any regulatory, any kind of regulatory authority by local political subdivisions such as Milford because that term was not included within the definition of state contained in the statute.

Now I think, first of all, that it is important to look at the legislative history because that is always helpful in determining what a statute means.

Basically the report of the Senate Agriculture Committee was that, "It is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving local authorities and political subdivisions of any and all

jurisdiction over pesticides and the regulation of pesticides." That is the Senate Agriculture Committee's report, reprinted in 1972 18 U.S. Code, Congressional and Administrative News, 3993 at 4008. Whereas the Commerce Committee Report, and this matter was a matter that was before both the Agriculture and Commerce Committees, the report of the Senate said, "The amendment of the Committee on Commerce is intended to continue the authority of such local governments and allow them to protect their environment to a greater degree than would EPA." 1972 Code, Congressional and Administrative News, 4092 at 4111.

The matter then went to a conference committee and a compromise substitute bill came out which did not contain any provision authorizing local regulations. In other words, the bill that came out was the one that had been presented by the Agriculture Committee not the Commerce Committee. When

the full Senate considered the bill after conference, of course the conference report was offered, and a statement was inserted into the Congressional Record stating that the amendments "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." Senator Allen on the floor made clear that the compromise did not include the Commerce Committee's amendment granting local governments authority to regulate pesticides.

Eventually the Conference Committee, leaving out the Senate Commerce Committee's amendment, was adopted, and both versions merely gave authority to the federal government and the states to regulate pesticides. As a matter of fact, there was no mention in the joint explanatory statement of the Conference Committee and the statute was eventually passed.

Subsequently, regulations were promulgated of the EPA and in 171.7(a) at 40 Federal Register 11700, it was specifically held, "It is not the intention of the Act 3 or these regulations to authorize political subdivisions below the state level to further regulate pesticides."

There are only two cases on this. One is the People ex rel Deukmejian v. County of Mendocino, 36 Cal3d 476, where the Court held that the term state should not be construed "to exclude agents of the enumerated party" such as local governments which are political subdivisions of the states. The other case is Maryland Pest Control v. Montgomery, 646 F.Supp 109, from the District of Maryland, which held that there was no authority for local units of government to make any regulations.

Now the Defendant City argues that there is no question but what the area of labeling and regulation of pesticides was preempted by

the statute but they argue this is not a regulation controlling pesticides or their use or labeling, that this is a different type, a police registration and posting requirement and was not of the kind that was intended to be preempted and that the power was there before and that the local communities still have it.

As I say, I think the case is a fairly close case but we start out with the fundamental proposition that Congress certainly possesses the power under the supremacy clause to preempt local as well as state laws, and that the preemption of local laws can take place in one of two ways. First, if Congress evidences an intent to occupy a given field, then any state law or local ordinance falling within that field is preempted. And, second, if the state law is in conflict with the federal statute, that there will be preemption there.

Now in this case the Congress clearly intended, in my opinion, to preempt this entire field and then it specifically gave states the right to operate within the field, and the rationale is one that can be rather easily understood. States and the federal government have the expertise to hire scientists, to do research, and to obtain the kind of information that is necessary for the purpose of determining what pesticides, insecticides, and the like are safe in the environment and which ones are not whereas local units of government generally, particularly small cities like Milford or any of the other small cities around the country, just don't have the facilities to do the kinds of work and research that is necessary.

Further, the other point that I think is important in looking at the rationale, looking at the statute and what it means, is the fact that if you allowed local governments to set up regulations in this field, you could have

300 different regulations in the State of Michigan, you could have every City coming up with a different plan, some could require postings for a week, others could require maybe the building of fences, the others could require policing, I mean all kinds of ordinances. If you say that they have got a right to do posting and they have got the right to take other actions like that that don't go directly to labeling of the types of pesticides, you could have 300 different regulations and certainly that is not rational. I think the analysis in Maryland Pesticide Control v. Montgomery, 646 F.Supp. 109, is excellent. I think it's on point and I think it is exhaustive. I think I will adopt that and I will grant the injunction of the Plaintiff.

You may present an order.

Thank you both very much.

C E R T I F I C A T E

I, Elizabeth A. Higdon, Official Court Reporter, do hereby certify that I reported the proceedings in the above-entitled matter by means of stenography at the time and place hereinbefore set forth, and that the same was hereafter reduced to typewritten form under my supervision and that the said transcript is a true and accurate transcript or my stenographic notes.

Elizabeth A. Higdon /s/
ELIZABETH A. HIGDON

CSR

DATED: October 18, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RECEIVED
SEP 12 1989
U.S. DISTRICT
COURT CLERK'S
OFFICE
E.D. MICH.

PROFESSIONAL LAWN
CARE ASSOCIATION OF
AMERICA,

Plaintiff,

vs.

Case No. 89-CV-71439-DT
Hon. Horace W. Gilmore

VILLAGE OF
MILFORD,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AND INJUNCTIVE
RELIEF AND DENYING DEFENDANT'S CROSS
MOTION FOR SUMMARY JUDGMENT

At a session of said Court held in the
Federal Courthouse, City of Detroit,
County of Wayne, State of Michigan on,

SEP 15 1989

PRESENT: HON: HORACE W. GILMORE
U. S. District Court Judge

This matter having come before this Court upon Plaintiff's Motion for Summary Judgment and Injunctive Relief, and Defendant's Cross Motion for Summary Judgment, and the Court having reviewed the Briefs filed by the

APPENDIX F

parties in this matter and having heard oral argument from counsel for both parties;

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment be and hereby is granted for the reasons set forth on the record in open Court on August 24, 1989 and for the reasons set forth in Maryland Pest Control Association v. Montgomery County, 646 F.Supp. 109 (D. MD. 1986), affirmed, 822 F.2d 55 (C.A. 4, 1987).

IT IS FURTHER ORDERED that the Defendant, Village of Milford, Michigan is hereby enjoined from enforcing Village of Milford Ordinance 197 on the grounds that said Ordinance is preempted by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§136 et seq.

IT IS FURTHER ORDERED that Defendant's Cross Motion for Summary Judgment is denied.

HORACE W. GILMORE
U.S. District Court Judge

APPROVED AS TO FORM:

BY: Kenneth A. Flaska (P28605)
Co-Counsel for Plaintiff

BY: Paul V. Groth (P37565)
Co-Counsel for Defendant

A TRUE COPY
CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

/s/ _____
DEPUTY CLERK